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IN THE SUPREME COURT

OF THE UNITED STATES

DECEMBER, 1975

NO. 75-931

BROOKSHIRE BROTHERS, INC., ET AL
Petitioners

v.

VIRDIE SMITH, ET AL
Respondents

REPLY OF RESPONDENTS TO PETITION
FOR WRIT OF CERTIORARI

Respondents pray that the writ of certiorari be denied.

THE FEDERAL QUESTION

The underlying question is whether summary detention, and incarceration without the barest rudiments of due process can be termed "state action" under the Civil Rights Act, where such action is carried out by store employees acting in concert with the police. A State Statute is involved. Petitioners

claimed to have the privilege of summary detention and incarceration of store patrons by virtue of the now repealed Article 1436e. There is direct testimony in the record that summary detention and incarceration of the respondents occurred as a result of a pre-arranged plan which called for participation by both store employees and police. The plan contained no safeguards for preliminary determination of probable cause.

STATEMENT

In their brief in the Circuit Court the petitioners did not attack Findings of Fact by the Trial Court as follows:

(1) That managerial officials of the store (the highest ones in authority) formulated the company plan to control shoplifting (Findings of Fact No. 2 and 3, Tr. 107).

(2) The plan envisioned that suspected shoplifters would be confined in the store pending a telephone call to the police, arrest and incarceration, and that the arrests were made without the filing of a

valid complaint and without any investigation "all of which was pursuant to said preconceived plan." (Finding No. 4, Tr. 107).

(3) The plan was adopted and ratified by management by causing the arrest and prosecution of from 300 to 500 patrons of the store (Finding No. 5, Tr. 107).

(4) That the respondent Donnie McClure had not passed through the check-out counter, and was not leaving the store when she was detained, and that the store employees did not have reasonable grounds to believe that she had wrongfully taken or wrongfully possessed a Fifty Nine Cent ($.59) jar of cold cream (Findings No. 7 and 8, Tr. 108).

The transcript shows without question that respondent Virdie Smith paid for her groceries (Tr. 12). Then she was requested to leave her merchandise on the check-out counter and go to the rear with a store employee (Tr. 13-15). The persons and purses of the respondents were searched (Tr. 24-25) and the store manager tore respondent Smith's

purse (Tr. 57). The officer testified that he was operating under a planned campaign to discourage shoplifting; that he was never called upon by petitioners or their employees to personally observe any action in the store or to make any investigation, and that he had been in the store on more than one occasion to carry accused patrons to the police station (Tr. 100-101). He said that he had no warrant (Tr. 106) and was given no report or accusation other than that "the respondents were shoplifters" (Tr. 108) and that no complaint was signed or filed and that he had no knowledge of the facts (Tr. 108-109).

The assistant manager Sandel testified that he and the store manager participated in all of the arrests made at the store (Tr. 161) and that he had personally participated in the apprehension of from 200 to 500 shoplifters "and maybe more" since September 13, 1971, and that blank complaints were used (Tr. 162-163).

This official testified that no warrant had been issued for the arrests of the respondents, and that the complaint he signed was a blank one (Tr. 181).

ARGUMENT

The self-help cases cited by petitioner at page 13 of its argument do not apply here. Petitioner's employees were not trying to recover property. Instead of assisting these elderly ladies as an ordinary store clerk would do, they hid behind the wall and peered through a peephole. In the case of Virdie Smith, they accepted payment for the merchandise. In the case of Donnie McClure, she had not even passed the check-out counter, and they could have had the property by merely telling her they did not want to sell it. To suggest that what they did to these old ladies was a necessary exercise of the ancient remedy of self-help, in order to regain possession of a Fifty Nine Cent ($.59) jar of cold cream, is unreasonable.

The Fifth Circuit cases cited by petitioner begin with James v. Pinnix, 495 F.2d 206, and the language of the Court in that case sets it apart from this one. The Court pointed out that in Hall vs. Garson, 403 F.2d 430, the landlady was seizing goods to satisfy a debt which had nothing to do with the goods. (She was

attempting to enforce a landlord's lien). The Court pointed out that in the James v. Pinnex case, the defendant merely seized an item to satisfy a purchase money lien. There was no detention of the person, no imprisonment, and no police officer. The same can be said of the other cases cited. In the Brookshire Brothers' case, however, the seizure of goods is not the basis of the action. It is seizure of the person. It is arrest, detention and summary incarceration without probable cause. It is not private action because it could only be carried out by the use of a police force. It necessarily involved a police force which had pre-arranged signals and routine with the owners of the store. It is unthinkable that a police officer would come out and arrest a citizen without asking a single question unless there had been some type of pre-arrangement between the police department and the store owners. Likewise, it is unthinkable that Brookshire Brothers could have carried out the arrest and detention and ex-parte questioning of as many as 500 of its patrons

without collaboration with the police.

This is not the case of an isolated store owner calling for aid from the police in order to regain possession of stolen property. Virdie Smith had paid for her merchandise, and Donnie McClure's jar of cold cream could have been had for the asking. These employees were trying to "make a case". They had the respondents summarily incarcerated without investigation and without probable cause, enlisting the aid of the police in doing so. Summary detention, arrest, and incarceration of as many as 500 patrons under this scheme or method cannot fairly be called a "private action." The Court of Appeals properly found that the case involved "state action."

It is not necessary that a person be an officer of the state for him to act "under color of law." It is enough that he is a willful participant in joint activity with the state or its agents. Addickes v. S. H. Kress & Co., 390 U.S. 260, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970). These men were "willful participants."

Specific intent to deprive a victim of a federal right is not required. Collaboration with public officials contains the necessary elements of "state action." It does not matter that the victim may also have a concurrent state remedy. He does not lose his federal remedy merely because the state might afford an alternate remedy. Monroe v. Pape, 365 U.S. 167, 5 L.Ed. 2d 492, 81 S.Ct. 473 (1961).

Petitioner sought to justify its action under Article 1436e of the Texas Penal Code (Fourth Defense, Tr. 66; this statute is reproduced in the addendum to this brief. It has now been repealed). This statute has a predecessor in Article 325 of the Code of Criminal Procedure of 1925 of the State of Texas. Under the earlier statute it was held in Henderson v. United States Fidelity and Guaranty Company, 298 SW 403 (Commission of Appeals, 1927) that a private person acting by virtue of the authority given him under such a statute would be "for the time being" an officer defacto, invested with all the privileges and burdened with all the penalities of an officer de jure.

Contrary to what may be said to be the law in other states, there is "no common law" right of arrest in Texas. Heath v. Boyd, 175 SW 2d 214 (Texas Supreme Court, 1943).

In Browning v. Pay-Less Self Service Shoes, Inc. 373 SW 2d 71 (Austin Civil Appeals, 1963) the Texas Court quoted with approval the following statement:

> "Since the manner of arresting without a warrant is exclusively regulated by the Constitution and the State Statutes, it follows that the authority to arrest without warrant cannot be conferred by common law or by the court decisions of other states."

Petitioner's cases, for most part, come from other jurisdictions and do not involve police who are acting in concert with individuals under color of a state statute.

CONCLUSION

In conclusion, the respondents respectfully submit the language of the Honorable Associate Justice Robert G. Hughes of the Austin Court of Civil Appeals in Browning v. Pay-Less Self Service Shoes, Inc.

373 SW 2nd 71 (Austin Court of Civil Appeals 1963):

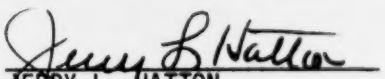
> "It is a matter of deep public concern when one citizen is authorized to arrest another citizen without a warrant issued in accordance with the law. Such arrests are fraught with grave danger to the public tranquility, peace and to individual freedom which we hold so dear. We do not for a moment believe that the Legislature has authorized a clerk in a variety store to arrest on suspicion of the theft of a ten cent bottle of perfume all the persons in the store, be they few or many, and carry them before a magistrate when the only evidence of the theft of the perfume is that it is not in its accustomed place and is never found. If the Legislature had authorized such indiscriminate citizen arrests without legal warrant and upon such flimsy grounds, its actions would be of extremely doubtful constitutionality. We are resolute in our conviction that the Legislature has made no such attempt, and that Art. 1436e, supra, plainly authorizes a citizen's arrest only as a concomitant to the seizure of property under the circumstances described in the statute.
>
> "We also hold that an issue of fact would be presented if Art. 1436e is applicable to this case which is whether or not appellee had reasonable ground to suppose that appellants had taken the property or committed the offense of shoplifting."

Under Rule 52, in cases of this kind, issues of fact are reserved for a decision by the judge who tries the case.

PRAYER

WHEREFORE, PREMISES CONSIDERED, respondents pray that the writ of certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that two true copies of the foregoing Reply of Respondents to Petition for Writ of Certiorari have been mailed by United States Mail to the Honorable Kenzy D. Hallmark, Attorney at Law, P. O. Drawer 1728, Lufkin, Texas 75901 on this 27 day of January, 1976.

JERRY L. HATTON

ADDENDUM A1

TEXAS PENAL CODE, ARTICLE 1436e:

Art. 1436e. Shoplifting

Text of article effective until January 1, 1974

Definition

Section 1. Any person while legally in a retail business establishment as an invitee or licensee who removes from its place, goods, edible meat or other corporeal personal property of any kind or character kept, stored or displayed for sale with the intent to fraudulently take and to deprive the owner of the value of the same and to appropriate the same to the use and benefit of the person taking is guilty of shoplifting. Altering of label or marking on goods, edible meat or other corporeal personal property or transferring same from one container to another with intent to defraud the owner also constitutes the crime of shoplifting.

Prevention of consequences of shoplifting

Sec. 2. All persons have a right to prevent the consequences of shoplifting by seizing any goods, edible meat or other corporeal property which has been so taken, and bringing it, with the supposed offender, if he can be taken, before a magistrate for examination, or delivering the same to a peace officer for that purpose. To justify such seizure, there must, however, be reasonable ground to suppose the crime of shoplifting to have been committed and the property so taken, and the seizure must be openly made and the proceeding had without delay.

Detention of persons

Sec. 3. Any merchant, his agent or employee, who has reasonable ground to believe that a person has wrongfully taken or has wrongful possession of merchandise, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating the ownership of such merchandise. Such reasonable detention shall not constitute an arrest nor shall it render the merchant, his agent or employee, liable to the person detained.

Conviction; penalties

Sec. 4. (a) For the first conviction of a violation of this Act, in the event the value of the goods, edible meat or other corporeal property which has been so taken, is less than Fifty Dollars ($50), punishment shall be by imprisonment in the county jail not exceeding two (2) years, and by a fine not exceeding One Thousand Dollars ($1,000).

(b) If it be shown, in the trial of a case involving a violation of this Act, in which the value of the goods, edible meat or other corporeal property is less than Fifty Dollars ($50), that the defendant has been once before convicted of the same offense, he shall, on his second conviction, be punished by confinement in the county jail for not less than thirty (30) days nor more than two (2) years, and by a fine not exceeding Two Thousand Dollars ($2,000).

POOR COPY

ADDENDUM A2

(c) If it be shown upon the trial of a case involving a violation of this Act, where the value of the goods, edible meat or other corporeal personal property is less than Fifty Dollars ($50), that the defendant has two (2) or more times before been convicted of the same offense, regardless of the value of the goods, edible meat or other corporeal personal property involved in the first two (2) convictions, upon the third or any subsequent conviction, the punishment shall be by confinement in the penitentiary for not less than two (2) nor more than ten (10) years.

(d) For a violation of this Act, in the event the value of the goods, edible meat or other corporeal property is Fifty Dollars ($50), or more, punishment shall be by confinement for not less than two (2) years nor more than ten (10) years.

Prosecutions; process and witnesses

Sec. 5. In all prosecutions under this Act, process shall be issued and served in the county or out of the county where prosecution is pending and have the same binding force and effect as though the offense being prosecuted were a felony; and all officers issued and serving such process in or out of the county wherein the prosecution is pending, and all witnesses from within or without the county wherein the prosecution is pending shall be compensated in like manner as though the offense were a felony in grade.

Savings clause

Sec. 6. If any section, subsection, clause, phrase or sentence of this Act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act and each section, subsection, clause, phrase or sentence thereof, irrespective of the fact that one or more of the sections, subsections, clauses, phrases or sentences be declared unconstitutional. Acts 1959, 56th Leg., p. 72, ch. 34, as amended Acts 1965, 59th Leg., p. 942, ch. 457, § 1.

Repeal

This article is repealed by Acts 1973, 63rd Leg., p. 991, ch. 399, § 3(a), effective January 1, 1974.

ADDENDUM B1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

VIRDIE SMITH, ET AL Plaintiffs	)	
VS.	)	NO. B-73-CA-78
BROOKSHIRE BROTHERS, INC.) ET AL Defendants	)	

FINDINGS OF FACT AND CONCLUSION OF LAW

The above-styled and numbered cause of action came on this day for consideration, the cause having been presented for trial, and the Court, having considered the evidence adduced therein, the pleadings, briefs of counsel in support and in opposition thereof, and having been fully advised on the premises, now makes and files its findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1.

All defendants are citizens of the State of Texas. The plaintiff Virdie Smith is a citizen of the State of Texas. The plaintiff Donnie McClure is a citizen of the State of Louisiana as of the time of the trial, and was a citizen of the State of Florida at the time of the occurrence in question.

2.

At the time of the arrest of the plaintiffs on September 13, 1971, the defendant Kenneth Sandel was the highest official present and was in control of the premises owned by the defendant Brookshire Brothers, Inc., in Chestnut Village in Lufkin, Texas.

3.

Wayne Rumsey, Kenneth Sandel's immediate superior who was absent at the time of the arrest, and the defendant Sandel formulated a company policy to

control shoplifting in the store, pursuant to their authority as officials of Brookshire Brothers, Inc.

4.

Kenneth Sandel and Wayne Rumsey devised a plan whereby suspected shoplifters would be confined in the store while the Police Department of the City of Lufkin was called by telephone to come and arrest the suspected shoplifters and take them to police headquarters for booking and fingerprinting. The arrests by the Police Department of the City of Lufkin were made without the filing of a valid complaint and without any investigation, all of which was pursuant to said preconceived plan.

5.

The plan as carried out by the defendant Sandel was adopted and ratified by the management of the defendant store by causing the arrest and prosecution of from 300 to 500 patrons of the store and by continuing to insist upon the prosecution of the plaintiffs in this case.

6.

The defendants Keneth Sandel and Glen Nevill saw the plaintiff Donnie McClure put a jar of cold cream in an outside pocket of her purse, and each defendant then went to the "observation portion" of the store to further observe the plaintiffs.

7.

Although Donnie McClure was in the vicinity of the checkout counter, she had not passed through the counter and was not in the process of leaving the store when detained by the defendants Sandel and Nevill.

8.

While the plaintiff's placing of a jar of cold cream in the outside pocket of her purse was cause for suspicion, the defendants Sandel and Nevill did not have reasonable grounds to believe that the

plaintiff McClure had wrongfully taken or wrongfully possessed the jar of cold cream at the time she was detained by them or when she was turned over to the police officer, because she had not been given the opportunity to pay the 59 cents for the jar of cold cream.

9.

The plaintiff Smith had done nothing suspicious other than glance from side to side while shopping, and she had paid for her groceries at the time she and the plaintiff McClure was detained. The defendants Sandel and Nevill did not have reasonable grounds to believe that the plaintiff Smith was aiding or abetting the plaintiff McClure in any wrongful taking or in any wrongful possession of the jar of cold cream at the time the plaintiff Smith was detained by them or when she was turned over to the police officer.

10.

Although the plaintiffs protested their innocense by stating that they had no intent to steal the cold cream and offered to pay for the cold cream, the Police Departmet of the City of Lufkin was still called to come and arrest the plaintiffs.

11.

With no independent investigation as to the facts of this incident and without the filing of a valid complaint, the plaintiffs were removed to Police Headquarters and booked and fingerprinted, causing embarrassment, humiliation, and damage to their respective reputations.

12.

As a result of the embarrassment, humiliation, and damage to her reputation, the plaintiff Virdie Smith sustained damages in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

13.

As a result of the embarrassment, humiliation, and damage to her reputation, the plaintiff Donnie McClure sustained damages in the sum of Six Thousand and No/100 ($6,000.00) Dollars.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of the subject matter and the parties under 42 U.S.C. Section 1983.

2.

The arrest and subsequent attempts to prosecute these plaintiffs were done under color of law.

3.

The arrest of these plaintiffs were carried out without probable cause to believe that the plaintiffs were guilty of shoplifting.

4.

The arrest and subsequent attempts to prosecute these plaintiffs constituted a deprivation of the civil rights of the plaintiffs.

5.

Costs of court shall be assessed against defendant. Final judgment shall be entered in accordance herewith.

DATED this 17th day of May, 1974.

/s/ JOE J. FISHER
UNITED STATES DISTRICT JUDGE